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Kang Hock Hin v Vasanthi a/p R Annamalai

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02(NCvC)(A)-2075–11 OF 2022
AZIZAH NAWAWI, SEE MEE CHUN AND LIM CHONG FONG JJCA
30 DECEMBER 2024

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Civil Procedure — Consent order — Breach of — Respondent contended private caveats were not withdrawn as envisaged by agreement but instead removed by appellant — High Court found appellant committed breach of consent order — Whether consent order had been complied by the appellant

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The appellant and the respondent had a share sale agreement ('the agreement') where the respondent purchased from the appellant all the shares in SBK Property Sdn Bhd ('the company'). Subsequently, a dispute arose between the parties concerning the interpretation of the agreement that resulted in the respondent commencing an originating summons against the appellant. The matter was however settled privately between the parties and a consent order was recorded. Consequently, the appellant procured Sie Kie Ching to withdraw the private caveat lodged by him and the entry of the caveat had thereafter been cancelled. The private caveat lodged by Sie Kie Won had been removed on the application of the company by the appellant as its director; hence the entry of the caveat was also cancelled. As the result of the cancellation of the aforesaid private caveats, the appellant's solicitors released the RM350,000 paid by the respondent to the appellant. The respondent was however dissatisfied with the manner of cancellation of the private caveats and thus instituted a High Court suit against the appellant ('the proceeding'). The respondent contended that the private caveats were not withdrawn by both Sie Kie Ching and Sie Kie Won as envisaged by the agreement but were instead removed by the company; thus, the consent order had been breached. The learned judge found against the appellant and hence this appeal.

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Held, allowing the appeal:

(1) The critical and pivotal issue revolved around the construction of the consent order, particularly cl 3 thereof. The appellant merely gave an undertaking to withdraw the caveats lodged by Sie Kie Ching and Sie Kie Won and thereafter upon the withdrawal of the caveats, the appellant's solicitors may release the respondent's payment of RM350,000 to the appellant. The central object of clauses of the consent order was to have both the private caveats cancelled. This had been achieved and therefore cl 3 of the consent order had been complied instead of breached when the

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payment of the RM350,000 was paid out to the appellant. The word 'withdrawal' in cl 3 of the consent order should be liberally interpreted contextually in view of its imprecision. There was no prejudice caused to the respondent because there was no evidence of any litigation brought against the company or the respondent by Sie Kie Won as the result of the cancellation of his private caveat. The learned judge erred when the declaratory reliefs sought by the appellant were allowed. There was no unjust enrichment or deceitful/dishonest conduct in the circumstances on the part of the appellant contrary to that as found by the learned judge, particularly when this proceeding had not been disposed by way of trial to justify such findings of fact. Additionally, the learned judge erred by having wrongly exercised his discretion in allowing declaratory reliefs against the company which was not a party in the proceeding (see paras 22, 25 & 28–30).

[Bahasa Malaysia summary

Perayu dan responden telah membuat perjanjian jual beli saham ('perjanjian') di mana responden membeli daripada perayu semua saham dalam SBK Property Sdn Bhd ('syarikat'). Kemudian, timbul pertikaian antara pihak-pihak mengenai tafsiran perjanjian yang mengakibatkan responden memulakan satu saman pemula terhadap perayu. Walau bagaimanapun, perkara itu telah diselesaikan secara peribadi antara pihak-pihak dan satu perintah persetujuan telah direkodkan. Oleh itu, perayu telah mendapatkan Sie Kie Ching untuk menarik balik kaveat persendirian yang dibuat olehnya dan kemasukan kaveat itu telah dibatalkan. Kaveat persendirian yang dibuat oleh Sie Kie Won telah dikeluarkan atas permohonan syarikat oleh perayu sebagai pengarahnya; oleh itu, kemasukan kaveat tersebut juga telah dibatalkan. Akibat pembatalan kaveat persendirian tersebut, peguam perayu telah melepaskan RM350,000 yang dibayar oleh responden kepada perayu. Walau bagaimanapun, responden tidak berpuas hati dengan cara pembatalan kaveat persendirian dan dengan demikian memulakan saman di Mahkamah Tinggi terhadap perayu ('prosiding'). Responden berpendapat bahawa kaveat persendirian tidak ditarik balik oleh Sie Kie Ching dan Sie Kie Won seperti yang dibayangkan dalam perjanjian tetapi sebaliknya telah dikeluarkan oleh syarikat; oleh itu, perintah persetujuan telah dilanggar. Hakim yang bijaksana membuat penemuan tidak menyebelahi perayu dan oleh itu rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Isu yang kritikal dan penting berkisar sekitar tafsiran perintah persetujuan, terutamanya klausa 3 daripadanya. Perayu hanya memberi aku janji untuk menarik balik kaveat yang dikemukakan oleh Sie Kie Ching dan Sie Kie Won dan seterusnya, setelah pembatalan kaveat tersebut, peguam perayu boleh melepaskan pembayaran RM350,000 daripada responden kepada perayu. Objektif utama klausa dalam

perintah persetujuan adalah untuk membatalkan kedua-dua kaveat persendirian. Ini telah dicapai dan oleh itu, klausa 3 perintah persetujuan telah dipatuhi, bukannya dilanggar apabila pembayaran RM350,000 dibayar kepada perayu. Perkataan 'tarik balik' dalam klausa 3 perintah persetujuan harus ditafsirkan secara bebas dalam konteks memandangkan ketidaktepatannya. Tiada prejudis yang ditimbulkan kepada responden kerana tidak ada keterangan sebarang litigasi yang dibawa terhadap syarikat atau responden oleh Sie Kie Won sebagai hasil daripada pembatalan kaveat persendiriannya. Hakim yang bijaksana terkhilaf apabila membenarkan relief pengisytiharan yang dipohon oleh perayu. Tiada pengayaan tidak adil atau kelakuan penipuan/tidak jujur dalam keadaan yang melibatkan perayu bertentangan dengan penemuan hakim yang bijaksana, terutamanya ketika prosiding ini belum diselesaikan melalui perbicaraan untuk membenarkan penemuan fakta sedemikian. Selain itu, hakim yang bijaksana terkhilaf dengan menyalahgunakan budi bicaranya dalam membenarkan relief pengisytiharan terhadap syarikat yang bukan merupakan pihak dalam prosiding (lihat perenggan 22, 25 & 28–30).]

Cases referred to

Balamoney a/p Asoriah (lawful mother and next friend of Jayandran a/l Mathan, a minor) v MMIP Services Sdn Bhd [2019] MLJU 2172; [2020] 1 CLJ 476, CA (refd)

Goh Joon v Kerajaan Negeri Johor & Ors [1998] 7 MLJ 621; [1999] 5 CLJ 335, HC (refd)

Wah Bee Construction Engineering v Pembinaan Fungsi Baik Sdn Bhd [1996] 3 CLJ 858, CA (refd)

Legislation referred to

National Land Code ss 325, 326

Appeal from: *Vasanthi R Annamalai v Kang Hock Hin* [2023] MLJU 3430 (High Court, Kuala Lumpur)

Dinesh Kanavaji a/l Kanawagi (with Rabia bt Abd Halim) (Rabia Farihan & Sures) for the appellant.

Chandrakandan a/l Sankaran (with Maithily a/p Manoher) (C Sankaran & Co) for the respondent.

Lim Chong Fong JCA:

INTRODUCTION

[1] This is an appeal against an alleged breach of a consent order recorded before the High Court.

[2] The appellant who is the defendant in the High Court is an individual.

[3] The respondent who is the plaintiff in the High Court is likewise an individual.

[4] We heard the appeal on 18 July 2024 and unanimously allowed the appellant's appeal with costs of RM10,000 subject to allocator.

[5] We now provide the grounds of our decision below.

BACKGROUND

[6] By a share sale agreement dated 25 February 2020 ('agreement'), the respondent purchased from the appellant all the shares in SBK Property Sdn Bhd ('company').

[7] The express terms of the agreement include the following:

> (4.2) The sum of Ringgit Malaysia Three Hundred Fifty Thousand (RM350,000.00) only to be paid by the Purchaser to the Vendor's solicitors who is authorised to pay to the two caveators named in the Recital 1(b) and (c) within twelve (12) months from the date of this Agreement.
>
> (4.3) Upon receipt of the sum as stated in clause 4.2, the Vendors and/or Vendor's solicitors shall cause and procure a duly executed withdrawal of caveat from the two caveators namely in recital (b) and (c) before the sum of RM350,000.00 is released to the said caveators.

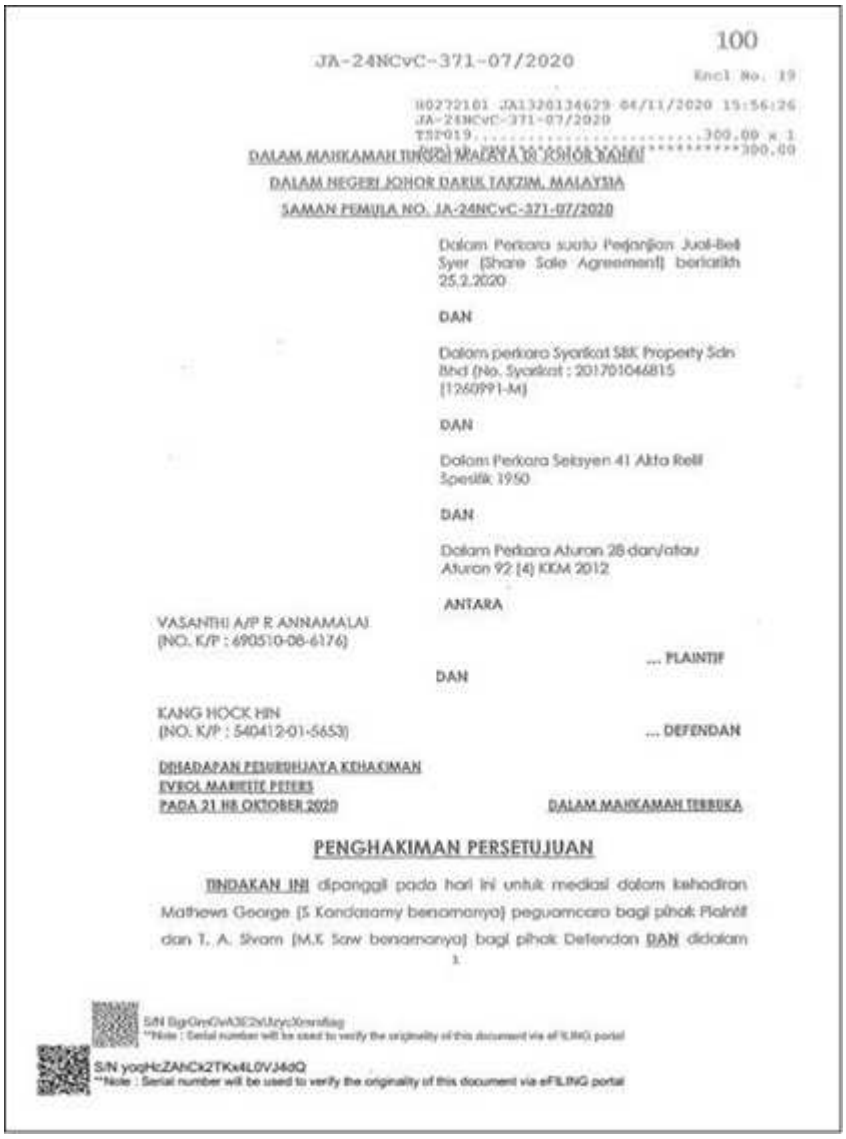
[8] Additionally, Schedule 1 of the agreement provides as follows:

> (8) The Company has no other bank borrowings and/or any encumbrances created over its assets for any bank borrowings except for the following:
>
> (a) A loan from MB Rich Sdn Bhd (Company No 933483-W) of Unit 5.07 Level 5 Plaza DNP, No 59, Jalan Dato' Abdullah Tahir 80300 Johor Bahru pursuant to Money Lending Agreement dated 25/4/2018 for the sum as stated int eh Statement of Account as per Appendix B and had entered Lien Holder's caveat under presentation No 14570/2018 dated 3 May 2018.
>
> (b) A loan from Sie Kie Ching (NRIC No 651221–13–5179) and Sie Kie Won (NRIC No 630331–13–5409) of Lot 753, 2nd Floor, Jalan Merpati, 98000 Miri, Sarawak for the sum of RM350,000.00 and had entered a private caveat under Presentation No 17192/2018 dated 30th May 2018.

[9] Subsequently, a dispute arose between the parties concerning the interpretation of the agreement that resulted in the respondent commencing

Johore Bahru High Court Originating Summons No JA-24(NCvC)-371–07 of 2020 against the appellant.

[10] The matter was however settled privately between the parties on 21 October 2020 and they recorded a consent order in the following terms in Bahasa Malaysia ('consent order'):



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DALAM MAHKAMAH TINGGI MALAYA DI JOHOR BAHRU

DALAM NEGERI JOHOR DARUL TAKZIM, MALAYSIA

SAMAN PEMULA NO. JA-24NCvC-371-07/2020

Dalam Perkara suatu Perjanjian Jual-Beli Syer (Share Sale Agreement) bertarikh 25.2.2020

DAN

Dalam perkara Syarikat SBK Property Sdn Bhd (No. Syarikat : 201701046815 (1260991-M)

DAN

Dalam Perkara Seksyen 41 Akta Relif Spesifik 1950

DAN

Dalam Perkara Aturan 28 dan/atau Aturan 92 (4) KKM 2012

ANTARA

VASANTHI A/P R ANNAMALAI
(NO. K/P : 690510-08-6176)

... PLAINTIF

DAN

KANG HOCK HIN
(NO. K/P : 540412-01-5653)

... DEFENDAN

DIHADAPAN PESURUHJAYA KEHAKIMAN
EVROL MARIETTE PETERS
PADA 21 HB OKTOBER 2020

DALAM MAHKAMAH TERBUKA

PENGHAKIMAN PERSETUJUAN

TINDAKAN INI dipanggil pada hari ini untuk mediasi dalam kehadiran Mathews George (S Kandasamy benamanya) peguamcara bagi pihak Plaintif dan T. A. Sivam (M.K Saw benamanya) bagi pihak Defendan DAN didalam

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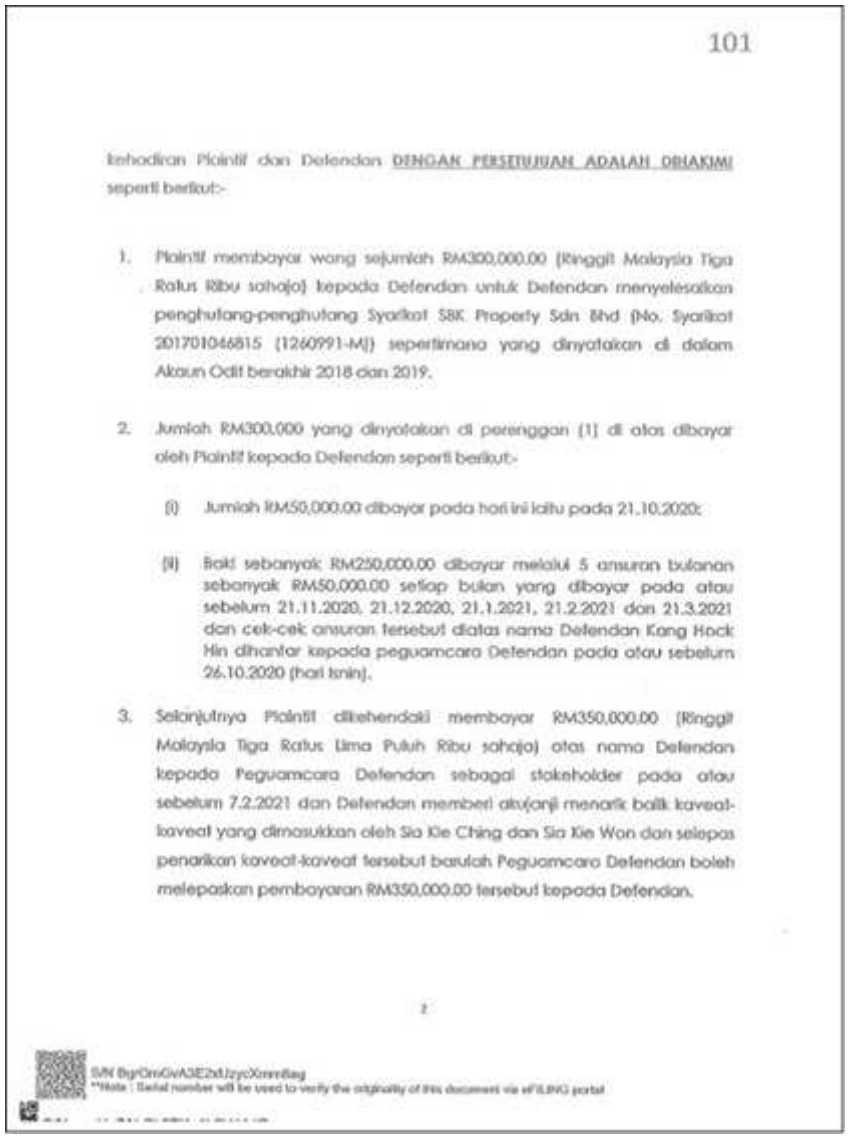

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terhadiran Plaintif dan Defendan DENGAN PERSETUJUAN ADALAH DIHAKIMI seperti berikut:-

1. Plaintif membayar wang sejumlah RM300,000.00 (Ringgit Malaysia Tiga Ratus Ribu sahaja) kepada Defendan untuk Defendan menyelesaikan penghutang-penghutang Syarikat SBK Property Sdn Bhd (No. Syarikat 201701046815 (1260991-M)) sepertimana yang dinyatakan di dalam Akaun Odit berakhir 2018 dan 2019.

2. Jumlah RM300,000 yang dinyatakan di perenggan (1) di atas dibayar oleh Plaintif kepada Defendan seperti berikut:-

   (i) Jumlah RM50,000.00 dibayar pada hari ini iaitu pada 21.10.2020;

   (ii) Baki sebanyak RM250,000.00 dibayar melalui 5 ansuran bulanan sebanyak RM50,000.00 setiap bulan yang dibayar pada atau sebelum 21.11.2020, 21.12.2020, 21.1.2021, 21.2.2021 dan 21.3.2021 dan cek-cek ansuran tersebut diatas nama Defendan Kang Hock Hin dihantar kepada peguamcara Defendan pada atau sebelum 26.10.2020 (hari Isnin).

3. Selanjutnya Plaintif dikehendaki membayar RM350,000.00 (Ringgit Malaysia Tiga Ratus Lima Puluh Ribu sahaja) atas nama Defendan kepada Peguamcara Defendan sebagai stakeholder pada atau sebelum 7.2.2021 dan Defendan memberi akujanji menarik balik kaveat-kaveat yang dimasukkan oleh Sia Kie Ching dan Sia Kie Won dan selepas penarikan kaveat-kaveat tersebut barulah Peguamcara Defendan boleh melepaskan pembayaran RM350,000.00 tersebut kepada Defendan.

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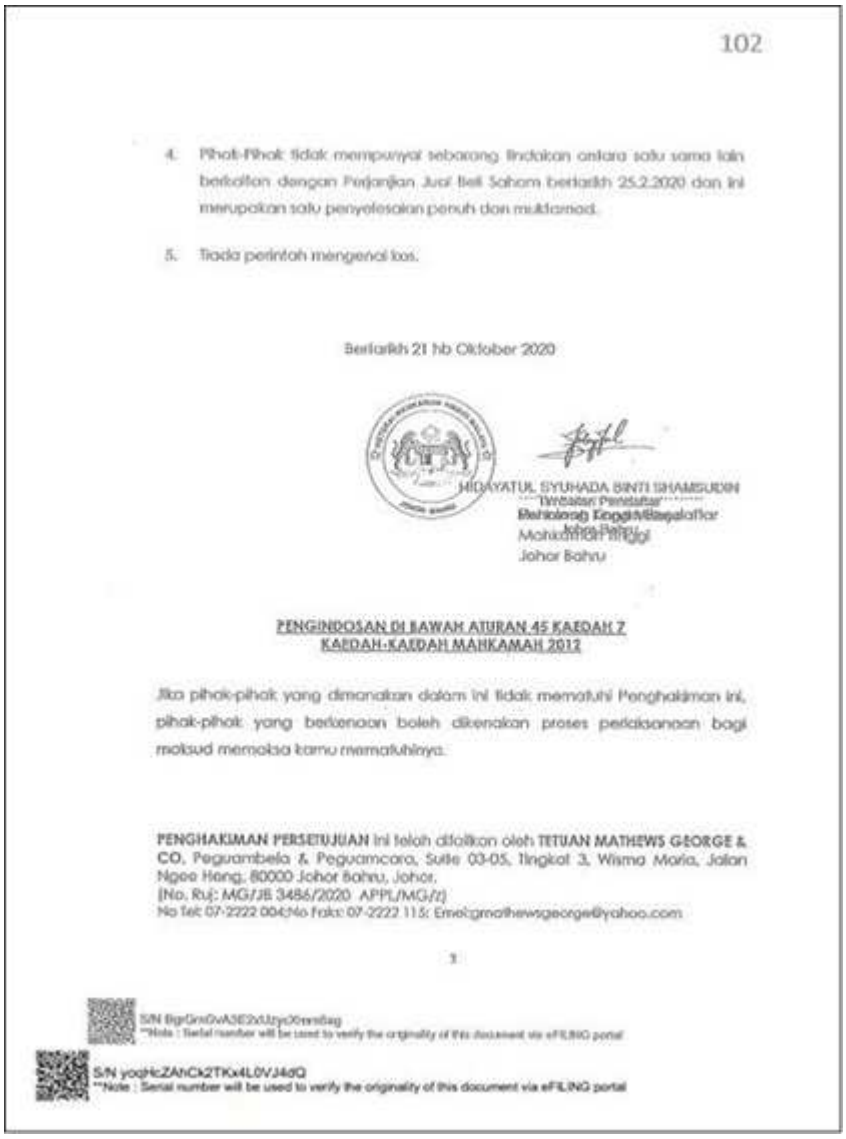

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4. Pihak-Pihak tidak mempunyai sebarang tindakan antara satu sama lain berkaitan dengan Perjanjian Jual Beli Saham bertarikh 25.2.2020 dan ini merupakan satu penyelesaian penuh dan muktamad.

5. Tiada perintah mengenai kos.

Bertarikh 21 hb Oktober 2020

HIDAYATUL SYUHADA BINTI SHAMSUDIN
Timbalan Pendaftar
Mahkamah Tinggi
Johor Bahru

PENGINDOSAN DI BAWAH ATURAN 45 KAEDAH 7
KAEDAH-KAEDAH MAHKAMAH 2012

Jika pihak-pihak yang dinamakan dalam ini tidak mematuhi Penghakiman ini, pihak-pihak yang berkenaan boleh dikenakan proses pelaksanaan bagi maksud memaksa kamu mematuhinya.

PENGHAKIMAN PERSETUJUAN ini telah difailkan oleh **TETUAN MATHEWS GEORGE & CO**, Peguambela & Peguamcara, Suite 03-05, Tingkat 3, Wisma Maria, Jalan Ngee Heng, 80000 Johor Bahru, Johor.
(No. Ruj: MG/JB 3486/2020 APPL/MG/zl)
No Tel: 07-2222 004;No Faks: 07-2222 115; Emel:gmathewsgeorge@yahoo.com

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[11] Consequently, the appellant on 20 January 2021 procured Sie Kie Ching to withdraw the private caveat lodged by him and the entry of the caveat has thereafter been cancelled.

[12] The private caveat lodged by Sie Kie Won has been removed on 8 June 2021 on the application of the company by the appellant as its director; hence the entry of the caveat is also cancelled.

[13] As the result of the cancellation of the aforesaid private caveats, the appellant's solicitors released the RM350,000 paid by the respondent to the appellant.

[14] The respondent is however dissatisfied with the manner of cancellation of the aforesaid private caveats and thus on 6 September 2021 instituted Johore Bahru High Court Suit Originating Summons No JA-24(NCvC)-537–09 of 2021 against the appellant ('proceeding'). In this regard, the respondent prayed for the following reliefs in the proceeding (in Bahasa Malaysia):

(i) Suatu deklarasi bahawa Plaintif dan/atau Syarikat SBK Property Sdn Bhd (No Syarikat: 1260991-M) telah menunaikan obligasi kontrak mereka sepertimana dan setakat yang dinyatakan di dalam Klausa 4.2 dan 4.3 (Company Liabilities) dan Jadual 1 (Schedule 1) Klausa 8 (ii) Perjanjian Jual Beli Syer (Share Sale Agreement) bertarikh 25.2.2020 yang dimasuki di antara Plaintif dan Defendan iaitu dengan membuat pembayaran jumlah wang RM350,000.00 tersebut kepada Defendan untuk memperolehi penarikan balik kaveat-kaveat persendirian oleh penghutang-penghutang/ pengkaveat-pengkaveat Sie Kie Ching dan Sie Kie Won tersebut;

(ii) Suatu deklarasi bahawa Plaintif dan/atau Syarikat SBK Property Sdn Bhd (No Syarikat: 1260991-M) telah mematuhi perenggan 3 dalam Penghakiman Persetujuan bertarikh 21.10.2020 yang dimasuki melalui prosiding Mahkamah Tinggi Johor Bahru Saman Pemula No. JA-24NCvC371-07-2020 iaitu dengan membayar jumlah wang RM350,000.00 kepada Peguamcara Defendan untuk memperolehi penarikan balik kaveat-kaveat oleh Sia Kie Ching dan Sie Kie Won tersebut;

(iii) Suatu deklarasi bahawa Defendan adalah bertanggungan sepenuhnya sekiranya penghutang-penghutang / pengkaveat-pengkaveat bernama Sie Kie Ching dan Sie Kie Won tersebut memulakan sebarang tindakan undang-undang terhadap Syarikat SBK Property Sdn Bhd (No Syarikat: 1260991-M) dan/atau memasuki semula kaveat persendirian keatas tanah milikan SBK Property Sdn Bhd (No Syarikat: 1260991-M).

(iv) Bahawa sekiranya Defendan tidak setuju kepada deklarasi-deklarasi yang dipohon oleh Plaintif di prayer (i), (ii) dan (iii) di atas, Defendan dikehendaki mengembalikan wang amanah RM350,000.00 tersebut yang telah dibayar oleh Plaintif kepada Defendan selaras Penghakiman Persetujuan bertarikh 21.10.2020 dalam masa empat belas (14) hari dari tarikh perintah Mahkamah ini.

(v) Kos permohonan ini adalah dibayar oleh Defendan kepada Plaintif;

(vi) Lain-lain relif yang Mahkamah yang Mulia ini anggap adil dan sesuai.

IN THE HIGH COURT

[15] The respondent's pivotal contention is that the appellant breached the consent order by failing to pay any money to the caveators to withdraw the caveats. The caveats were instead removed by the appellant who had no

authority to do so at the material times. A

[16] However, the appellant refuted that he has fully and satisfactorily complied with the consent order.

[17] The learned judge found against the appellant ('judgment') and stated, inter alia, as follows in the grounds of judgment ('GOJ'): B

> [10] This court finds that the defendant has committed a breach of the clear terms of the consent order and appropriated the money to himself instead of paying the sum of RM350,000 to the two caveators to settle the loans given by them to the company (as stated in cl 8 of Schedule 1 of the SSA). Likewise, the solicitors for the defendant also breached their stakeholder duty by releasing the monies to the defendant without waiting for the executed withdrawal of caveat forms as provided by cl 4.3 of the SSA. C
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> [11] The sum of RM350,000 is not the only amount misappropriated by the defendant. As part of the consent order, the plaintiff had earlier paid a sum of RM300,000 to the defendant to settle all other debts of the company, which was not disclosed in the SSA (see the other parts of the consent order, exh V6 of the plaintiff's affidavit in support encl 2). However, this sum was never paid to the company's creditors but was again appropriated by the defendant for himself. This is evidenced by the fact that a creditor called Bandari Simma Realty had filed a suit against the Company at the Johor Bahru Sessions Court (Suit No JA-A252NCVC-200–11 of 2021)) for the sum of RM252,000 owed by the Company. D E
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> [12] The defendant had not provided any evidence in his affidavit in reply nor had he averred that he had paid the sum of RM350,000 to the caveators. Thus, the plaintiff's averment that the defendant had failed to pay the sum of the caveators remains unrebutted (see *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; [1995] 1 CLJ 609). F
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> [13] One can thus, see the pattern of deceitful conduct by the defendant. G
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> [14] The defendant's failure to pay the sum of RM350,000.00 owed to the caveators (the debts were acknowledged by the defendant in his representations in Schedule 1 to the SSA) would render the company still liable for those debts and the company's liability to the caveators will remain outstanding. Additionally, the failure by the defendant to pay the caveators was a clear breach of the terms of the consent order. H
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> [15] To allow the defendant to retain the sum of RM350,000, which was meant to discharge the liability of the company to its creditors, would be clearly unjust as the defendant would stand to benefit from his dishonest conduct and be unjustly enriched. I

[18] The appellant is dissatisfied with the judgment and has on 28 October 2022 appealed to the Court of Appeal.

A FINDINGS OF THIS COURT

[19] Before us, the parties basically re-hashed their contentions made in the High Court.

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[20] Our appellate function here is review of the judgment only as encapsulated in *Wah Bee Construction Engineering v Pembinaan Fungsi Baik Sdn Bhd* [1996] 3 CLJ 858 (CA) where Gopal Sri Ram JCA (later FCJ) held as follows:

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> Now, it is settled law that in an appeal against the exercise of discretion by a judge, the initial function of this court is one of review only, there being no original discretion vested in this court. Only after an appellant is able to demonstrate to a conviction that his case comes within one or more of those categories of cases in which appellate interference is warranted does this court become entitled to exercise a discretion of its own.

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[21] The respondent in the proceeding sought for various declaratory reliefs against both the appellant and the company. The main plank of the respondent's contention is that the private caveats were not withdrawn by both Sie Kie Ching and Sie Kie Won as envisaged by the share sale agreement but were instead removed by the company; thus, the consent order has been breached.

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[22] Upon our review, we find that the critical and pivotal issue revolves around the construction of the consent order, particularly cl 3 thereof.

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[23] First and foremost, we are mindful that the construction of the consent order must be confined and subject to the 'four corners' rule in that it must be read in its textual content as expressed excluding extraneous considerations.

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[24] In this respect, we noted in passing that the obligation in cl 3 of the consent order does not synonymously mirror cll 4.2 and 4.3 of the share sale agreement. Nonetheless and in any event, both cll 4.2 and 4.3 of the share sale agreement are extraneous considerations here and are hence irrelevant for purposes of construing cl 3 of the consent order.

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[25] Upon our careful reading of cl 3 of the consent order, we find that the appellant merely gave an undertaking to withdraw the caveats lodged by Sie Kie Ching and Sie Kie Won and thereafter upon the withdrawal of the caveats, the appellant's solicitors may release the respondent's payment of RM350,000 to the appellant.

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[26] As the matter of law, the appellant is definitely not in the position to

withdraw the private caveat because that can only be done by the caveator based s 325 of the National Land Code. In other words, the obligation consented upon as expressed is unworkable.

[27] Consequently, the appellant, in actuality, procured Sie Kie Ching to withdraw his own private caveat but caused the company to remove the private caveat lodged by Sie Kie Won based on s 326 of the National Land Code . On the facts here, Sie Kie Won neither contested the removal of the private caveat nor subsequently lodged a new private caveat.

[28] Notwithstanding the un-workability of cl 3 of the consent order, we nonetheless find that the central object of clauses of the consent order is to have both the private caveats cancelled. This has been achieved and we therefore conclude that cl 3 of the consent order has been complied instead of breached when the payment of the RM350,000 is paid out to the appellant. In this regard, we take the view that the word 'withdrawal' in cl 3 of the consent order should be liberally interpreted contextually in view of its imprecision. We are also mindful that there is no prejudice caused to the respondent because there is no evidence of any litigation brought against the company or the respondent by Sie Kie Won as the result of the cancellation of his private caveat.

[29] In the premises, we find the learned judge erred when the declaratory reliefs sought by the appellant were allowed. There is no unjust enrichment or deceitful/dishonest conduct in the circumstances on the part of the appellant contrary to that as found by the learned Judge, particularly when this proceeding has not been disposed by way of trial to justify such findings of fact.

[30] Additionally, we find that learned judge erred by having wrongly exercised his discretion in allowing declaratory reliefs against the company which is not a party in the proceeding following *Balamoney a/p Asoriah (lawful mother and next friend of Jayandran a/l Mathan, a minor) v MMIP Services Sdn Bhd* [2019] MLJU 2172; [2020] 1 CLJ 476 (CA) as well as declaratory reliefs that are hypothetical and/or premature following *Goh Joon v Kerajaan Negeri Johor & Ors* [1998] 7 MLJ 621; [1999] 5 CLJ 335.

CONCLUSION

[31] For the foregoing reasons, we find that appellate intervention is warranted and we thus allowed the appeal as so ordered.

A *Appeal allowed.*

Reported by Nabilah Syahida Abdullah Salleh

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